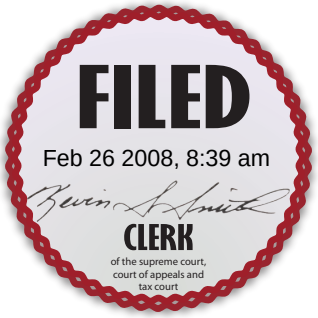

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IN THE
COURT OF APPEALS OF INDIANA

AL CRITTENDEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0707-CR-419
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William T. Robinette, Judge
Cause No.49G03-0610-FA-208445

February 26, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a jury trial, Al Crittenden appeals his sentence for conspiracy to commit robbery, a Class B felony. Crittenden argues that his ten-year sentence, with seven years suspended, is inappropriate given the nature of the offense and his character. Concluding his sentence is not inappropriate, we affirm.

Facts and Procedural History

On October 18, 2006, Crittenden, James Patterson, and some other friends discussed a plan to call a pizza delivery person to a vacant house and then rob said delivery person (the "Victim"). Not surprisingly, different versions exist as to what transpired after this agreement was reached. Regardless, someone ordered a pizza using Patterson's cell phone and the group waited for the Victim to arrive. According to Patterson,[1] when the delivery person arrived, Crittenden called out "hey that's mine," walked up to the Victim, and after conversing briefly with the Victim regarding the price of the pizza, struck the Victim in the face. Transcript at 132-33. The Victim fell to the ground and Crittenden then kicked and hit the Victim repeatedly. Two other members of the group also ran up and struck or kicked the Victim. The group took the Victim's pizzas and cell phone. Crittenden claims that he never agreed to rob the Victim, and instead had attempted to convince the group to let him pay for the pizza. Crittenden claims that while he was talking to the Victim, Patterson came up from behind the Victim and struck him in the head. Crittenden claims he ran home at this point. The Victim suffered a concussion, amnesia, and had to spend time in the emergency room for

treatment and observation.

On October 27, 2006, the State charged Crittenden with robbery, a Class A felony, and conspiracy to commit robbery, a Class B felony.[2] On May 3, 2007, the trial court held a jury trial, following which the jury found Crittenden guilty of conspiracy to commit robbery and not guilty of robbery. On June 26, 2007, the trial court held a sentencing hearing. At this hearing, the trial court made the following statement:

> You can't deny the man was knocked unconscious however.
> ***
> And you heard severely.
> ***
> And I can't deny from what [the jury] found him guilty that Mr. Crittenden was a party to that robbery.
> ***
> He denied it here, yet, today. He seemed to do that, not accept responsibility, but I understand he has appeal coming up and certain restraints people feel they can say and can't say. But the evidence that I heard, he was participating in all the evidence and he was one who the evidence, I believe, walked up to the man with a hoodie on, real close to him and it was alleged whether he said it or not, that somebody said that he was the one that yelled at the man at first. . . .
> ***
> I do acknowledge, also, that he had no juvenile record and his parents have been here – we don't have many parents coming in . . . I remember them because we don't have a lot coming in and the concern they've shown for their son throughout. However, he has been convicted of a very serious offense. And this is his first felony. . . .

Tr. at 365-66. The trial court sentenced Crittenden to the advisory sentence of ten years, with one year served at the Department of Correction, two years on home detention, and the

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[1] Patterson agreed to testify against Crittenden pursuant to a plea agreement regarding this incident and other, unrelated charges.

[2] The State also charged Crittenden with robbery, a Class B felony, involving a separate incident. The State later dismissed this charge.

remaining seven years suspended with two of the suspended years to be served on probation. Crittenden now appeals.

Discussion and Decision

"Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution 'authorize independent appellate review and revision of a sentence imposed by the trial court.'" Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007) (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)), clarified on reh'g, 875 N.E.2d 218. When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). When determining whether a sentence is inappropriate, we recognize that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). We must examine both the nature of the offense and the defendant's character. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When conducting this inquiry, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. The burden is on the defendant to demonstrate that his sentence is inappropriate. Childress, 848 N.E.2d at 1080.

Here, Crittenden was sentenced to the advisory sentence, but is required to serve only one year in prison, and two years on home detention. We acknowledge that Crittenden received a sentence of ten years, as a suspended sentence is a sentence actually imposed. See Drakulich v. State, 877 N.E.2d 525, 534 n.10 (Ind. Ct. App. 2007) ("A suspended sentence is one actually imposed but the execution of which is thereafter suspended." (quoting Beck v. State, 790 N.E.2d 520, 523 (Ind. Ct. App. 2003) (Mattingly-May, J., concurring in result)); Pagan v. State, 809 N.E.2d 915, 926 n.9 (Ind. Ct. App. 2004) (recognizing that this court "will consider suspended portions of a sentence as well as executed portions when considering the appropriateness of a sentence"), trans. denied. However, suspending a portion of a sentence (and in this case a significant portion) constitutes a form of leniency and the decision of whether to suspend part or all of a sentence is of fundamental importance to the defendant,[3] State, trial court, and appellate courts. Cf. State ex rel. Goldsmith v. Marion County Superior Court, 275 Ind. 545, 552, 419 N.E.2d 109, 114 (1981) (where the trial court has accepted a plea agreement, "[t]o allow the trial court to either increase or suspend the executed sentence, would deny the parties the essential purpose of their agreement" (emphasis added)). Indeed, appellate courts have remanded in situations where trial courts erroneously thought they had no authority to suspend part or all of a sentence. E.g., Henning v. State, 477 N.E.2d 547, 553 (Ind. 1985); Howard v. State, 873 N.E.2d 685, 691 (Ind. Ct. App. 2007). Therefore, although we review Crittenden's sentence as a ten-year sentence, we are not completely oblivious to the fact that, assuming he commits no further

[3] Indeed, on appeal, Crittenden requests this court to revise his sentence not only by reducing the total

violations, he will serve only one year in prison and two years on home detention. See Biddinger v. State, 868 N.E.2d 407, 414 (Ind. 2007) ("The place that a sentence is to be served is an appropriate focus for application of our review and revise authority."); Hightower v. State, 866 N.E.2d 356, 373-74 (Ind. Ct. App. 2007) (recognizing that "the court made all the sentences concurrent, suspended half of the time for each, and permitted [the defendant] to serve one year in community corrections"), trans. denied; cf. Neale, 826 N.E.2d at 639 (holding defendant's sentence of fifty years, with ten years suspended inappropriate and reducing the sentence to forty years, with ten years suspended); Blixt v. State, 872 N.E.2d 149, 153 (Ind. Ct. App. 2007) ("[Defendant] has not persuaded us that his six-year sentence, with two years suspended to probation, is inappropriate.").

In regard to Crittenden's character, we recognize that the instant offense was his second criminal conviction. His other conviction was for public intoxication, a Class B misdemeanor. The significance of this criminal history is minimal, as this other conviction is unrelated in nature and seriousness to the instant offense. See Bryant v. State, 841 N.E.2d 1154, 1156 (Ind. 2006) (recognizing that the weight of a defendant's criminal history "is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability"). Still, we note that although Crittenden was convicted of public intoxication prior to being convicted of the instant offense, he committed public intoxication after committing, and while awaiting trial on the conspiracy offense. We

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sentence to six years, but also by dispensing with any executed time.

also recognize that Crittenden was eighteen years old at the time of the offense, and that youth sometimes may be worthy of mitigating weight. See Brown v. State, 720 N.E.2d 1157, 1159 (Ind. 1999) ("The fact that [the defendant] was sixteen at the time of this crime is an important fact in our review of the 'character of the offender.'").

The State also makes much of Crittenden's admission to the pre-sentence investigator that he smokes marijuana. In no way do we condone Crittenden's use of an illegal drug. However, were it not for Crittenden's voluntary statement, we would have no indication that Crittenden used marijuana. At no point did Crittenden attempt to reduce his responsibility for his actions by blaming drugs, and Crittenden has no convictions or arrests for substance abuse crimes. We also note that although a defendant's drug use is often viewed as an aggravating circumstance, it may also be viewed as a mitigating circumstance in some cases. See Iddings v. State, 772 N.E.2d 1006, 1018 (Ind. Ct. App. 2002), trans. denied. The purpose of a pre-sentence investigation is "to provide information to the court for use at individualized sentencing." Robeson v. State, 834 N.E.2d 723, 725 (Ind. Ct. App. 2005), trans. denied. It is important "to ensure the court has before it all relevant information about the defendant's background it needs to formulate an appropriate sentence." Hulfachor v. State, 813 N.E.2d 1204, 1207 (Ind. Ct. App. 2004). We recognize that a trial court may rely on statements or admissions made by a defendant in a pre-sentence report, Brown v. State, 659 N.E.2d 671, 673 (Ind. Ct. App. 1995), trans. denied, but point out that in this case the trial court made no mention of Crittenden's marijuana use. On the circumstances of this case, we find that the negative impact Crittenden's marijuana use has on his character is

tempered, if not completely offset, by the fact that he honestly and voluntarily admitted to such use where nothing else in the record hints at such use.

Evidence introduced at trial regarding Crittenden's actions following the arrest of Patterson, whom Crittenden believed has snitched on him, also comments on Crittenden's character. Patterson wrote an email to a mutual friend and instructed her to give it to Crittenden; in this email Patterson denied snitching on Crittenden and made a veiled threat as to what would happen if Crittenden attempted to fight Patterson. Crittenden responded by writing a letter to Patterson in which he initially restated his belief that Patterson had snitched on him, and then stated,

> And do you know who the fuck I am. I got to be one of the craziest niggas in the streets so don't ever try threaten me in a note bitch that's just making me think you wanna fight me, but to be honest with [you] I wasn't even gonna fight you until this court case is over with because I was scared you would snitch again.

State's Exhibit 3A. Although we realize that Crittenden's response to Patterson's cooperation with police is common, such a response still comments negatively on his character.

In regard to the nature of the offense, although Crittenden argues that he was merely present at the scene, the jury found that he not only agreed to commit this robbery, but also took the substantial step of hitting the Victim and causing him serious bodily injury. See Appellant's App. at 159 (Jury Instruction Number 16, stating that as an element of conspiracy, the State must prove that Crittenden "performed an overt act in furtherance of the agreement to wit; struck [the Victim] on the head which resulted in serious bodily injury, that

is: unconsciousness, to [the Victim]"). We recognize that all contemplated robberies involve at least the threat of harm, and all robberies as Class B felonies involve bodily injury to another. See Ind. Code § 35-42-5-1. However, in this case, Crittenden not only struck the Victim in the head, but also struck and kicked the Victim repeatedly after knocking him to the ground. Two of Crittenden's cohorts joined in the beating, which left the Victim unconscious and in need of emergency medical care.

Although we are mindful of Crittenden's youth and the limited nature of his criminal history, we conclude that the nature of the offense renders an advisory sentence appropriate.

Conclusion

We conclude Crittenden's sentence of ten years, with one year executed in the Department of Correction, two years executed on home detention, and the remainder suspended is not inappropriate given his character and the nature of the offense.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.